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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

E.K. WADE,

Plaintiff,

v.

ELAINE CHAO, SECRETARY OF
LABOR, ET AL.

Defendant.

Consolidated Case No. C 08-00001 JSW

**THE FEDERAL DEFENDANT'S
ANSWER TO COMPLAINT 08-00021**

For its Answer to Plaintiff's Complaint, Defendant ELAINE CHAO SECRETARY OF
THE DEPARTMENT OF LABOR ("Federal Defendant"), admits, denies, and alleges as follows:

1. The Federal Defendant denies the allegations in this paragraph to the extent that Plaintiff, E.K. Wade ("Plaintiff") has failed to exhaust his administrative remedies or to comply with the statute of limitations, which may make jurisdiction improper.
2. Admit.
3. Admit.
4. The Federal Defendant lacks sufficient information to admit or deny the allegations in this paragraph.
5. The Federal Defendant admits that during the time Plaintiff Wade was employed with the Department of Labor that it had an office in Oakland California,

however, currently the Agency does not have an office in Oakland California and on that basis denies the allegations in this paragraph.

6. Elaine Chao is the Secretary of Labor, U.S. Department of Labor, and therefore we admit this paragraph only as to Defendant Chao.

Unnumbered Paragraphs Statement of the Case (hereinafter SOC ¶1 - SOC ¶5)

SOC ¶ 1. This paragraph contains argument to which no response is required.

SOC ¶ 2. This paragraph contains legal conclusions to which no response is required. In addition, the text of the appellate decisions speaks for itself and on that basis the Federal Defendant denies the allegations in this paragraph.

SOC ¶ 3. The Federal Defendant admits that the EEOC/OFO decision in Case No. 01A52667 vacated part of the Agency's decision and remanded the issues of (d) Notice of proposed suspension in October 2004 and (e) constructive discharge in October 2004.

SOC ¶ 4. Admit.

SOC ¶ 5. The Federal Defendant admits that on December 18, 2007, the Federal Defendant and Plaintiff entered into a Stipulation and [Proposed] Order Dismissing Complaint Case No. C 06-4725 MJJ. The parties agreed that "The new complaint will allege that plaintiff has satisfied the jurisdictional prerequisites for filing his claims in federal court" and "the new complaint will allege that plaintiff has exhausted the MSPB process as of January 17, 2007 when the Federal Circuit affirmed the MSPB's dismissal of plaintiff's claim." The Court entered the Order related to this stipulation on December 28, 2007.

FIRST CAUSE OF ACTION

7. The Federal Defendant hereby incorporates its responses to paragraphs 1-6 and SOC ¶¶ 1-5.

8. This paragraph contains legal conclusions to which no response is

required, on that basis the Federal Defendant denies the allegations in this paragraph.

9. The Federal Defendant admits that Plaintiff's anniversary date was September 26, 2000. The Federal Defendant admits that Plaintiff was not promoted to GS-11 on October 10, 2001. The Federal Defendant denies the remaining allegations in the paragraph.

10. The Federal Defendant admits that the Plaintiff used in appropriate language toward Linda Smith in October 2001. The Federal Defendant denies that DD Luevano and ADD Martin forced Plaintiff to move to different cubicle. The Federal Defendant lacks sufficient information to admit or deny the remaining allegations in this paragraph and, on that basis, denies the remaining allegations.

11. Admit.

12. The Federal Defendant admits that on or about January 4, 2002, Plaintiff was sent to Reno, Nevada on a work assignment. The Federal Defendant lacks sufficient information to admit or deny the remaining allegations in this paragraph and on that basis denies the remaining allegations.

13. Deny.

14. Deny.

15. Deny.

16. The Federal Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies the allegations in this paragraph.

17. Deny.

18. The Federal Defendant admits that Plaintiff re-filed a Step 1 grievance regarding a claim for failure to promote to GS-11 on or about July 3, 2002. The Federal Defendant lacks sufficient information to admit or deny the remaining allegations in this paragraph and on that basis denies the

1 remaining allegations in this paragraph.

2 19. With respect to the first sentence in this paragraph, the Federal Defendant
3 admits that on or about July 28, 2002, Plaintiff was promoted to GS-11
4 without “back pay”, but denies any assertion and allegation with respect to
5 arreages. The Federal Defendant lacks sufficient information to admit or
6 deny the allegation in the second sentence in this paragraph and on that
7 basis denies the allegation.

8 20. With respect to the first sentence in this paragraph, the Federal Defendant
9 admits that on or about August 7, 2002, Plaintiff requested to transfer from
10 Assistant District Director (“ADD”) Georgia Martin’s module to ADD
11 Alberto Rocha’s module. The Federal Defendant admits that the Plaintiff
12 characterized his request as one for reasonable accommodation. The
13 Federal defendant lacks sufficient information to admit or deny the
14 remainder of the first sentence and on that basis denies the remaining
15 allegation. The Federal Defendant admits that Plaintiff’s request to
16 transfer was denied. The Federal Defendant denies the remainder of the
17 allegations in the second sentence of this paragraph.

18 21. The Federal Defendant lacks sufficient information to admit or deny the
19 allegations in this paragraph and on that basis denies the allegations in this
20 paragraph.

21 22. The Federal Defendant lacks sufficient information to admit or deny the
22 allegations in this paragraph and on that basis denies the allegations in this
23 paragraph.

24 23. The Federal Defendant lacks sufficient information to admit or deny the
25 allegations in this paragraph and on that basis denies the allegations in this
26 paragraph.

27 24. The Federal Defendant lacks sufficient information to admit or deny the
28 allegations in this paragraph and on that basis denies the allegations.

1 25. The Federal Defendant admits that the promotion to GS-12 was denied or
2 delayed. The Federal Defendant denies the second sentence in this
3 paragraph. The Federal Defendant denies the third sentence in this
4 paragraph. The Federal Defendant lacks sufficient information to admit or
5 deny the allegations in the fourth sentence in this paragraph and on that
6 basis denies the allegations therein. The Federal Defendant denies that
7 Plaintiff always met the standards for performance; the Federal Defendant
8 lacks sufficient information to admit or deny the remainder of this
9 sentence and on that basis denies the remainder. The Federal Defendant
10 denies the allegation in the sixth sentence in this paragraph.

11 26. The Federal Defendant admits that on or about August 1, 2003, Plaintiff
12 was denied his request to be promoted to GS-12, but denies remaining
13 allegations in this sentence. With regard to the second sentence the
14 Federal Defendant admits that a meeting took place between Smitherman
15 and Martin, but denies the remaining allegations in this sentence. The
16 Federal Defendant denies the allegations in the third sentence. The
17 American Federation of Government Employees regulations speak for
18 themselves and on that basis the Federal Defendant denies the allegation in
19 the fourth sentence. The Federal Defendant denies the fifth sentence of this
20 paragraph. The Federal Defendant lacks sufficient information to admit or
21 deny the allegations in the sixth sentence in this paragraph and on that
22 basis denies the allegations. The Federal Defendant admits that Plaintiff
23 met the GS-11 performance standards; however the Federal Defendant
24 lacks sufficient information to admit or deny the remaining allegations of
25 the seventh sentence and on that basis denies the allegations. The Federal
26 Defendant denies the allegations in the eighth sentence in this paragraph.

27 27. The Federal Defendant admits that on or about January 13, 2004, Plaintiff
28 sent a letter to Georgia Martin with carbon copy to Smitherman regarding

promotion to GS-12. The Federal Defendant lacks sufficient information to admit or deny the remaining allegations in this paragraph and on that basis denies the allegations.

28. The Federal Defendant admits that on or about February 22, 2004, Plaintiff went out on medical disability. The Federal Defendant denies the remaining allegations in this paragraph.

29. The Federal Defendant admits that Plaintiff filed a Workers Compensation claim, but denies that it was filed on or about February 25, 2004.

30. The Federal Defendant admits that plaintiff's Worker's Compensation claim was denied, but denies the remainder of the allegations in this paragraph.

31. The Federal Defendant admits that on or about March 24, 2004, the Plaintiff requested 80 hours of Advanced Sick leave and that request was granted. The Federal Defendant denies the remaining allegations the paragraph.

32. Deny.

33. The Federal Defendant admits that Plaintiff returned from leave. The Federal Defendant denies that the leave was disability leave.

34. The Federal Defendant admits that on or about May 3, 2004, Plaintiff requested 160 hours of Advanced Sick Leave from the Defendant. The Federal Defendant asserts that the DOL/AFGE and AFL-CIO regulations speak for themselves and on that basis deny the allegations in this paragraph relating to those regulations. The Federal Defendant denies the allegations in the last sentence of this paragraph.

35. The Federal Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies the allegations therein.

36. The Federal Defendant lacks sufficient information to admit or deny the

allegations in this paragraph and on that basis denies the allegations therein.

37. The Federal Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies the allegations therein.

38. The Federal Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies the allegations therein.

39. The Federal Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies the allegations therein.

40. The Federal Defendant admits that on or about May 14, 2004, Plaintiff wrote a letter to Charles James regarding the denial of his request for advanced sick leave, but denies the remaining allegations in this paragraph.

41. Deny.

42. The Federal Defendant admits that on or about May 27, 2004, Plaintiff filed a complaint with the Office of Special Counsel alleging failure to grant advanced sick leave, failure to grant reasonable accommodation and whistle blower retaliation, but denies the remaining allegations in this paragraph. .

43. The Federal Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies the allegations.

44. The Federal Defendant denies the allegations in the first sentence of this paragraph. The Federal Defendant lacks sufficient information to admit or deny the remaining allegations and on that basis denies them.

45. The Federal Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies the allegations

therein.

46. The Federal Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies the allegations.

47. The Federal Defendant admits that on or about August 2, 2004 that the Plaintiff applied for disability retirement. The Federal Defendant denies the remaining allegations in this complaint.

48. The Federal Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies the allegations therein.

49. The Federal Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies the allegations.

50. The Federal Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies the allegations therein.

51. The Federal Defendant admits that the Plaintiff filed an informal EEO complaint alleging discrimination in promotion, disability, race, disparate treatment, hostile work environment harassment and retaliation. The Federal Defendant denies the remaining allegations in this paragraph.

52. The Federal Defendant admits that Plaintiff filed a formal complaint of discrimination CRC Case No. 03-09-171, alleging discrimination. The Federal Defendant denies the remaining allegations in this paragraph.

53. The Federal Defendant admits that Plaintiff filed a formal complaint of discrimination CRC Case No. 03-09-171, alleging discrimination. The Federal Defendant denies the remaining allegations in this paragraph.

54. The Federal Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies the allegations therein.

55. The Federal Defendant admits that on or about September 7, 2004,

1 Plaintiff, Batiste, and Roberts met in the Oakland District Office
2 conference room and that plaintiff made a comment to Roberts and Batiste
3 that included the use of the term “Negroes.” The Federal Defendant denies
4 the remaining allegations in the paragraph.

5 56. Admit.

6 57. The Federal Defendant admits that on or about October 11, 2004, Plaintiff
7 submitted a letter of resignation. The Federal Defendant denies the
8 remainder of the allegations in this paragraph.

9 58. The Federal Defendant admits that Plaintiff’s resignation was rejected.
10 The Federal Defendant lacks sufficient information to admit or deny the
11 remainder of the allegations in this paragraph and on that basis denies
12 them.

13 59. The Federal Defendant admits that Plaintiff left a message on Charles
14 James’s voice mail on or about October 12, 2004. The Federal Defendant
15 denies the remaining allegations in this paragraph.

16 60. The Federal Defendant lacks sufficient information to admit or deny the
17 factual allegations in this paragraph and on that basis denies the factual
18 allegations in this paragraph. The remainder of this paragraph constitutes
19 a legal conclusion to which no response is required.

20 61. The Federal Defendant admits that on or about October 18, 2004, the
21 Federal Protective Services interviewed the Plaintiff. The Federal
22 Defendant lacks sufficient information to admit or deny the remaining
23 allegations in this paragraph and on that basis denies them.

24 62. The Federal Defendant admits that on or about October 18, 2004, a
25 photograph of Plaintiff was posted in the Department of Labor’s offices in
26 San Francisco, California. The Federal Defendant lacks sufficient
27 information to admit or deny the remaining allegations and on that basis
28 denies the allegations.

63. The Federal Defendant admits that on or about October 21, 2004, ADD Nelson sent Plaintiff a letter rescinding the Notice of Proposed 14-day Suspension and placed plaintiff on administrative leave from the office. The remaining allegation in this paragraph is incomplete; therefore the Federal Defendant lacks sufficient information to admit or deny the allegation and on that basis denies the allegation.

64. The Federal Defendant admits that on or about November 10, 2004, Plaintiff filed an EEO complaint alleging constructive discharge. The remaining allegations in this paragraph are legal conclusions to which no response is required.

65. The Federal Defendant admits that on or about November 23, 2004, Plaintiff was sent a letter regarding his removal.

66. The Federal Defendant admits that on or about December 6, 2004 the EEOC issued a Notice of Possible Decision Without A Hearing. The remaining allegations in this paragraph are legal conclusions to which no response is required.

67. Admit.

68. Admit.

69. The Federal Defendant admits that on January 9, 2005, Plaintiff filed an appeal with the MSPB regarding removal. The remaining allegations in this paragraph consist of legal conclusions and legal argument to which no response is required. Further, the documents referenced by Plaintiff speak for themselves; accordingly, the Federal Defendant denies any allegation purporting to quote from a document.

70. The Federal Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies the allegations therein.

71. The Federal Defendant lacks sufficient information to admit or deny the

allegations in this paragraph and on that basis denies the allegations therein.

72. The Federal Defendant admits that the on January 24, 2005 the Department of Labor issued a final agency decision implementing the EEOC decision issued on December 6, 2004. The remaining allegations in this paragraph constitute a legal conclusion to which no response is required.

73. The Federal Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies the allegations therein.

74. Admit.

75. The Federal Defendant admits that on or about February 14, 2005, a final decision was issued by Defendant concerning Plaintiff's complaint of unlawful employment discrimination (Agency Case No. 04-09-147). The documents referenced by Plaintiff speak for themselves; accordingly, the Federal Defendant denies any allegation purporting to quote from a document.

76. The Federal Defendant admits that on February 21, 2005, Plaintiff filed an appeal of the Final Agency Decision issued on February 14, 2005 (Agency Case No. 04-09-147). The remainder of the paragraph is argument to which no response is required.

77. The Federal Defendant admits that on or about February 18, 2005, Plaintiff filed an appeal with MSPB regarding removal (Case No. SF-0752-05-0272-I-1). The documents referenced by Plaintiff speak for themselves; accordingly, the Federal Defendant denies any allegation purporting to quote from a document.

78. The Federal Defendant admits that on or about March 4, 2005, Plaintiff had a hearing before CUIAB Judge Deborah Schissell. The Federal

1 Defendant lacks sufficient information to admit or deny the allegations in
2 this paragraph and on that basis denies the allegations therein.

3 79. The Federal Defendant admits that on or about March 10, 2005, CUIAB
4 issued a decision regarding Plaintiff's entitlement to unemployment
5 benefits. The documents referenced by Plaintiff speak for themselves;
6 accordingly, the Federal Defendant denies any allegation purporting to
7 quote from a document.

8 80. The Federal Defendant admits that on or about April 29, 2005, the MSPB
9 issued an Initial Decision. Further, the Initial Decision speaks for itself,
10 and therefore, the Federal Defendant denies the remaining allegations in
11 this paragraph.

12 81. The Federal Defendant admits that on or about May 17, 2005, Plaintiff
13 filed an appeal with the MSPB alleging constructive discharge, Case No.
14 SF-0752-05-0640-I-1. The remainder of the paragraph is argument to
15 which no response is required.

16 82. The Federal Defendant admits that on or about September 12, 2005, the
17 MSPB issued an Initial Decision. Further, the Initial Decision speaks for
18 itself, and therefore, the Federal Defendant denies the remaining
19 allegations in this paragraph.

20 83. The Federal Defendant admits that on or about October 12, 2005, Plaintiff
21 filed an appeal. The Federal Defendant denies the remaining allegations in
22 this paragraph.

23 84. The Federal Defendant admits that the EEOC's Office of Federal
24 Operations affirmed the EEOC decision dated January 24, 2005 in favor of
25 Defendant (Agency Case No. 03-09-171).

26 85. Admit.

27 86. This paragraph purports to state conclusions of law to which no response
28 is required.

87. This paragraph purports to state conclusions of law to which no response is required.

88. This paragraph purports to state conclusions of law to which no response is required.

89. This paragraph purports to state conclusions of law to which no response is required.

90. This paragraph purports to state conclusions of law to which no response is required.

91. This paragraph purports to state conclusions of law to which no response is required.

92. The Federal Defendant admits that Plaintiff is African American. The Federal Defendant denies the allegations in the remainder of this paragraph.

93. This paragraph purports to state conclusions of law to which no response is required.

94. This paragraph purports to state conclusions of law to which no response is required.

95. This paragraph purports to state conclusions of law to which no response is required.

96. The Federal Defendant lacks sufficient information to admit or deny the factual allegations in this paragraph and on that basis denies those allegations. The remainder of this paragraph states legal conclusions to which no response is required.

97. This paragraph purports to state conclusions of law to which no response is required.

98. This paragraph purports to state conclusions of law to which no response is required.

99. The Federal Defendant lacks sufficient information to admit or deny the

1 factual allegations in this paragraph and on that basis denies those
2 allegations with the exception that the Federal Defendant admits that
3 Plaintiff is African American. The remainder of this paragraph states legal
4 conclusions to which no response is required.

5 100. This paragraph purports to state conclusions of law to which no response
6 is required.

7 101. This paragraph purports to state conclusions of law and legal argument to
8 which no response is required.

9 102. This paragraph purports to state conclusions of law to which no response
10 is required.

11 103. This paragraph contains legal argument to which no response is required.

12 104. This paragraph purports to state conclusions of law and legal argument to
13 which no response is required.

14 105. This paragraph purports to state conclusions of law and legal argument to
15 which no response is required.

16 106. This paragraph purports to state conclusions of law and legal argument to
17 which no response is required.

18 107. This paragraph purports to state conclusions of law to which no response
19 is required.

20 108. This paragraph contains legal argument to which no response is required.

21 109. This paragraph contains legal argument to which no response is required.

22 110. This paragraph contains legal argument to which no response is required.

23 **SECOND CAUSE OF ACTION**

24 111. The Federal Defendant incorporates its responses to paragraphs 1-110 as
25 though fully stated herein.

26 112. This paragraph contains conclusions of law and legal argument to which
27 no response is required.

28 113. This paragraph contains conclusions of law and legal argument to which

no response is required.

114. This paragraph contains conclusions of law and legal argument to which no response is required.

115. This paragraph contains conclusions of law and legal argument to which no response is required.

116. This paragraph contains conclusions of law and legal argument to which no response is required.

117. This paragraph contains conclusions of law and legal argument to which no response is required.

118. The Federal Defendant admits that on or about February 22, 2004, Plaintiff went out on disability. The Federal Defendant denies the remaining allegations in this paragraph.

119. This paragraph contains conclusions of law and legal argument to which no response is required.

120. This paragraph contains conclusions of law and legal argument to which no response is required.

121. This paragraph contains conclusions of law and legal argument to which no response is required.

122. This paragraph contains conclusions of law and legal argument to which no response is required.

123. The Federal Defendant incorporates by reference each of its responses to paragraphs 8 through 85 as though fully stated herein.

124. This paragraph contains conclusions of law to which no response is required.

125. This paragraph contains conclusions of law to which no response is required.

126. This paragraph contains conclusions of law and legal argument to which no response is required.

127. This paragraph contains conclusions of law and legal argument to which no response is required.
128. This paragraph contains conclusions of law to which no response is required.
129. This paragraph contains conclusions of law to which no response is required.
130. This paragraph contains conclusions of law and legal argument to which no response is required.
131. This paragraph contains conclusions of law to which no response is required.
132. This paragraph contains conclusions of law to which no response is required.
133. This paragraph contains conclusions of law and legal argument to which no response is required.
134. This paragraph contains conclusions of law and legal argument to which no response is required.
135. This paragraph contains conclusions of law and legal argument to which no response is required.
136. This paragraph contains conclusions of law and legal argument to which no response is required.
137. This paragraph contains conclusions of law and legal argument to which no response is required.
138. The Federal Defendant incorporates by reference each of its responses to paragraphs 100 through 108 as though fully stated herein.
139. This paragraph contains conclusions of law and legal argument to which no response is required.
140. This paragraph contains conclusions of law and legal argument to which no response is required.

THIRD CAUSE OF ACTION

141. The Federal Defendant incorporates by reference each of its responses to paragraphs 1 through 6 as though fully stated herein.
142. This paragraph contains conclusions of law and legal argument to which no response is required.
143. The Federal Defendant incorporates by reference each of its responses to paragraphs 8 through 85 as though fully stated herein.
144. This paragraph contains conclusions of law and legal argument to which no response is required.
145. This paragraph contains conclusions of law and legal argument to which no response is required.
146. This paragraph contains conclusions of law and legal argument to which no response is required.
147. This paragraph contains conclusions of law and legal argument to which no response is required.
148. This paragraph contains conclusions of law and legal argument to which no response is required.
149. This paragraph contains conclusions of law to which no response is required.
150. This paragraph contains conclusions of law and legal argument to which no response is required.
151. This paragraph contains conclusions of law and legal argument to which no response is required.
152. This paragraph contains conclusions of law and legal argument to which no response is required.
153. This paragraph contains conclusions of law and legal argument to which no response is required.
154. This paragraph contains conclusions of law and legal argument to which

no response is required.

155. This paragraph contains conclusions of law and legal argument to which no response is required.

156. This paragraph contains conclusions of law and legal argument to which no response is required.

157. This paragraph contains conclusions of law and legal argument to which no response is required.

158. This paragraph contains conclusions of law and legal argument to which no response is required.

159. The Federal Defendant incorporates by reference each of its responses to paragraphs 100 through 108 as though fully stated herein.

160. This paragraph contains conclusions of law and legal argument to which no response is required.

161. This paragraph contains conclusions of law and legal argument to which no response is required.

FOURTH CAUSE OF ACTION

162. The Federal Defendant incorporates by reference each of its responses to paragraphs 1 through 6 as though fully stated herein.

163. The Federal Defendant denies the allegations in the first sentence of this paragraph. The Federal Defendant lacks sufficient information to admit or deny the information in the second sentence of this paragraph and on that basis denies the allegations contained therein.

164. The Federal Defendant admits that on or about October 7, 2004 the Plaintiff was issued a Notice of Proposed Suspension for the use of offensive language. The Federal Defendant lacks sufficient information to admit or deny the information in the second sentence of this paragraph and on that basis denies the allegations contained therein.

165. The Federal Defendant incorporates by reference each of its responses to

paragraphs 8 through 85 as though fully stated herein.

166. This paragraph contains conclusions of law and legal argument to which no response is required.

167. This paragraph contains conclusions of law and legal argument to which no response is required.

168. This paragraph contains conclusions of law and legal argument to which no response is required.

169. This paragraph contains conclusions of law and legal argument to which no response is required.

170. This paragraph contains conclusions of law and legal argument to which no response is required.

171. This paragraph contains conclusions of law and legal argument to which no response is required.

172. This paragraph contains conclusions of law and legal argument to which no response is required.

173. This paragraph contains conclusions of law and legal argument to which no response is required.

174. This paragraph contains conclusions of law and legal argument to which no response is required.

175. This paragraph contains conclusions of law and legal argument to which no response is required.

176. This paragraph contains conclusions of law and legal argument to which no response is required.

177. This paragraph contains conclusions of law and legal argument to which no response is required.

178. This paragraph contains conclusions of law and legal argument to which no response is required.

179. This paragraph contains conclusions of law and legal argument to which

no response is required.

180. The Federal Defendant incorporates by reference each of its responses to paragraphs 100 through 108 as though fully stated herein.

181. This paragraph contains conclusions of law and legal argument to which no response is required.

182. This paragraph contains conclusions of law and legal argument to which no response is required.

FIFTH CAUSE OF ACTION

183. The Federal Defendant incorporates by reference each of its responses to paragraphs 1 through 6 as though fully stated herein.

184. This paragraph contains conclusions of law and legal argument to which no response is required.

185. This paragraph contains conclusions of law and legal argument to which no response is required.

186. The Federal Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies the allegations stated therein.

187. The Federal Defendant lacks sufficient information to admit or deny the allegations in the first sentence of this paragraph and on that basis denies the allegations stated therein. The remainder of the paragraph states conclusions of law to which no response is required.

188. The Federal Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies the allegations stated therein.

189. The Federal Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies the allegations stated therein.

190. The CUIAB final decision is a document that speaks for itself; accordingly

the Federal Defendant denies any allegation based upon alleged quotation of the document.

191. The Federal Defendant incorporates by reference each of its responses to paragraphs 8 through 85 as though fully stated herein.

192. This paragraph contains conclusions of law and legal argument to which no response is required.

193. This paragraph contains conclusions of law and legal argument to which no response is required.

194. This paragraph contains conclusions of law and legal argument to which no response is required.

195. This paragraph contains conclusions of law and legal argument to which no response is required.

196. This paragraph contains conclusions of law and legal argument to which no response is required.

197. This paragraph contains conclusions of law and legal argument to which no response is required.

198. This paragraph contains conclusions of law and legal argument to which no response is required.

199. This paragraph contains conclusions of law and legal argument to which no response is required.

200. This paragraph contains conclusions of law and legal argument to which no response is required.

201. This paragraph contains conclusions of law and legal argument to which no response is required.

202. This paragraph contains conclusions of law and legal argument to which no response is required.

203. This paragraph contains conclusions of law and legal argument to which no response is required.

1 204. This paragraph contains conclusions of law and legal argument to which
2 no response is required.

3 205. The Federal Defendant lacks sufficient information to admit or deny the
4 allegations in this paragraph and on that basis denies the allegations stated
5 therein.

6 206. The Federal Defendant incorporates by reference each of its responses to
7 paragraphs 100 through 108 as though fully stated herein.

8 207. This paragraph contains conclusions of law and legal argument to which
9 no response is required.

10 208. This paragraph contains conclusions of law and legal argument to which
11 no response is required.

12 **SIXTH CAUSE OF ACTION**

13 209. The Federal Defendant incorporates by reference each of its responses to
14 paragraphs 1 through 6 as though fully stated herein.

15 210. The Federal Defendant lacks sufficient information to admit or deny the
16 allegations in this paragraph and on that basis denies the allegations stated
17 therein.

18 211. With respect to the first sentence in this paragraph, the Federal Defendant
19 admits that on or about August 1, 2003, Plaintiff requested a reasonable
20 accommodations transfer to another module, but denies the remaining
21 allegations in this sentence. The Federal Defendant admits that Plaintiff's
22 request was denied. The Federal Defendant denies the remaining
23 allegations in this paragraph.

24 212. The Federal Defendant lacks sufficient information to admit or deny the
25 allegations in this paragraph and on that basis denies the allegations stated
26 therein.

27 213. The Federal Defendant incorporates by reference each of its responses to
28 paragraphs 8 through 85 as though fully stated herein.

1 214. This paragraph contains conclusions of law and legal argument to which
2 no response is required.

3 215. This paragraph contains conclusions of law and legal argument to which
4 no response is required.

5 216. This paragraph contains conclusions of law and legal argument to which
6 no response is required.

7 217. This paragraph contains conclusions of law and legal argument to which
8 no response is required.

9 218. This paragraph contains conclusions of law and legal argument to which
10 no response is required.

11 219. This paragraph contains conclusions of law and legal argument to which
12 no response is required.

13 220. This paragraph contains conclusions of law and legal argument to which
14 no response is required.

15 221. This paragraph contains conclusions of law and legal argument to which
16 no response is required.

17 222. This paragraph contains conclusions of law and legal argument to which
18 no response is required.

19 223. The Federal Defendant incorporates by reference each of its responses to
20 paragraphs 100 through 108 as though fully stated herein.

21 224. This paragraph contains conclusions of law and legal argument to which
22 no response is required.

23 225. This paragraph contains conclusions of law and legal argument to which
24 no response is required.

25 **SEVENTH CAUSE OF ACTION**

26 On May 13, 2008, the Court dismissed with prejudice Plaintiff's Seventh Cause of
27 Action; therefore no response is required.

EIGHTH CAUSE OF ACTION

On May 13, 2008, the Court dismissed with prejudice Plaintiff's Eighth Cause of Action; therefore no response is required.

PRAYER FOR RELIEF

The remainder of the Complaint constitutes Plaintiff's prayer for relief to which no response is required, but to the extent a response is deemed necessary, the Federal Defendant denies that Plaintiff is entitled to the relief requested or to any relief whatsoever.

GENERAL DENIAL

Defendant denies any allegations not specifically admitted herein. The Federal Defendant also objects to this Complaint to the extent that it fails to comply with Rule 8 of the Federal Rules of Civil Procedure, which requires a short plain statement of the case.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

To the extent Plaintiff fails to state any claim on which relief can be granted, that claim should be dismissed.

SECOND AFFIRMATIVE DEFENSE

(Failure to Exhaust Administrative Remedies)

To the extent Plaintiff has failed to exhaust administrative remedies with respect to any claim, that claim should be dismissed.

THIRD AFFIRMATIVE DEFENSE

(Not Qualified Individual)

Plaintiff cannot prevail on a claim for disability discrimination because Plaintiff is not a "qualified individual" under the Rehabilitation Act of 1973.

FOURTH AFFIRMATIVE DEFENSE

(No Adverse Actions)

Plaintiff cannot prevail on any claim of discrimination or retaliation because Defendant

1 took no adverse employment action against Plaintiff.

2 **FIFTH AFFIRMATIVE DEFENSE**

3 **(No Similarly Situated Employee)**

4 Plaintiff cannot prevail on a claim of disability or age discrimination because no
5 “similarly situated” employee was treated more favorably.

6 **SIXTH AFFIRMATIVE DEFENSE**

7 **(Undue Hardship)**

8 Plaintiff cannot prevail on a claim that he was denied “reasonable accommodation”
9 because Defendant engaged in the required interactive process and the only accommodation
10 Plaintiff would accept, full-time work from home, imposed an undue hardship on the Defendant.

11 **SEVENTH AFFIRMATIVE DEFENSE**

12 **(No Failure to Promote)**

13 Plaintiff cannot prevail on a claim that the agency failed to promote him because he failed
14 to show that he was qualified for the desired position.

15 **EIGHTH AFFIRMATIVE DEFENSE**

16 **(Untimely Exhaustion)**

17 To the extent Plaintiff seeks relief for alleged conduct occurring more than the prescribed
18 number of days within which he was required to file an administrative complaint, such claims are
19 barred.

20 **NINTH AFFIRMATIVE DEFENSE**

21 **(Failure to Mitigate)**

22 Plaintiff’s damages, if any, are barred by failure to mitigate.

23 **TENTH AFFIRMATIVE DEFENSE**

24 **(Exclusive Remedy and Relief Limited)**

25 Title VII is Plaintiff’s exclusive remedy in this action, and his relief, if any, is limited to
26 that provided by 42 U.S.C. sections 2000e *et seq.*, as amended by the Civil Rights Act of 1991,
27 and 42 U.S.C. section 1981a(b)(3).
28

ELEVENTH AFFIRMATIVE DEFENSE

(Legitimate Non-Discriminatory Factors)

Plaintiff may obtain no relief because any adverse employment actions taken against him were based on legitimate non-discriminatory reasons other than plaintiff's age or disability and those reasons were not pretextual.

TWELFTH AFFIRMATIVE DEFENSE

(Adverse Actions Taken in Any Event)

Each of Plaintiff's claims is barred because any adverse employment actions taken against him would have been taken regardless of his age or disability.

THIRTEENTH AFFIRMATIVE DEFENSE

(Good Cause)

Each of Plaintiff's claims is barred because defendant had good cause for its conduct.

FOURTEENTH AFFIRMATIVE DEFENSE

(Management Discretion)

Any and all conduct of which Plaintiff complains or which is attributable to defendant was a just and proper exercise of management discretion undertaken in good faith for a fair and honest reason other than Plaintiff's age or disability.

FIFTEENTH AFFIRMATIVE DEFENSE

(Privilege or Justification)

Any actions and/or omissions attributable to defendant were at all times privileged or justified.

SIXTEENTH AFFIRMATIVE DEFENSE

(Waiver)

Each of Plaintiff's claims is barred to the extent he waived his right to recover.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Estoppel)

Plaintiff is equitably estopped from asserting claims against defendant because he has

1 induced, caused, and/or contributed to the alleged conduct of which he now complains.

2 **EIGHTEENTH AFFIRMATIVE DEFENSE**

3 **(Laches)**

4 Plaintiff's claims are barred to the extent that he unreasonably delayed.

5 **NINETEENTH AFFIRMATIVE DEFENSE**

6 **(Set-Off)**

7 Defendant is entitled to a set-off against any award of damages to Plaintiff of any
8 outstanding debt or obligation of Plaintiff to the United States Department of Labor or any
9 federal agency, any worker's compensation, unemployment or disability benefits, any benefits
10 under the benefit plans of the United States Department of Labor or others, and any benefits from
11 any federal agency or federally-funded agency that Plaintiff receives or has received for injuries
12 or damages alleged in the first amended complaint.

13 **TWENTIETH AFFIRMATIVE DEFENSE**

14 **(Costs and Attorneys' Fees)**

15 Plaintiff knew or should have known his claims are without reasonable basis in law and
16 equity and cannot be supported by a good faith argument for extension, modification, or reversal
17 of existing law. Defendant is therefore entitled to recover reasonable attorneys' fees, expenses,
18 and costs incurred by and through this action.

19 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

20 **(Right to Assert Additional Defenses)**

21 Defendant reserves the right to amend this Answer to assert any other defenses in law or
22 equity that may become apparent through the course of discovery.

23 //

24 //

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PRAYER FOR RELIEF

WHEREFORE, the Federal Defendant requests that the Court enter judgment in favor of the Elaine Chao, Secretary of the Department of Labor, that the Complaint be dismissed with prejudice, Elaine Chao, Secretary of the Department of Labor and that is granted such other and further relief as the Court may deem just and proper, including recovery of all costs of suit and appropriate fees.

Respectfully submitted,

JOSEPH P. RUSSONIELLO
United States Attorney

/s/

Dated: May 27, 2008

MELISSA K. BROWN
Assistant United States Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the Office of the United States Attorney for the Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that she is causing a copy of the following:

THE FEDERAL DEFENDANT'S ANSWER CV -08-00021 JSW

to be served this date upon the party in this action by placing a true copy thereof in a sealed envelope, and served as follows:

☒ **FIRST CLASS MAIL** by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing U.S. mail in accordance with this office's practice.

☐ **PERSONAL SERVICE (BY MESSENGER)**

☐ **FEDERAL EXPRESS**

☐ **FACSIMILE (FAX)** Telephone No.: See Below

to the party(ies) addressed as follows:

E.K. Wade 542 North Civic Drive, Apt. D Walnut Creek, CA 94597		
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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on May 27, 2008 at San Francisco, California.

S/ Kathy Terry

KATHY TERRY
Legal Assistant